

**T.W., Appellant**

**U.S. POSTAL SERVICE, POST OFFICE,  
New York, NY, Employer**

*Appearances:*

*James D Muirhead, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

### Case Submitted on the Record

Before:

## ***JURISDICTION***

On August 14, 2018 appellant, through counsel, filed a timely appeal from a May 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 4, 2016; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals after April 4, 2016 causally related to the accepted August 16, 2013 employment injury.

## **FACTUAL HISTORY**

On August 19, 2013 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on August 16, 2013, he sustained a low back injury when he lifted a tub of mail while in the performance of duty. He stopped work on August 17, 2013 and did not return.

On August 29, 2013 OWCP accepted appellant's claim for a strain of back, lumbar region. On January 28, 2014 it expanded acceptance of his claim to include exacerbation of disc herniation with foraminal stenosis at L4-5, and disc bulge with facet arthrosis at L2-3. OWCP paid appellant wage-loss compensation on the supplemental rolls as of October 8, 2013 and on the periodic rolls as of December 15, 2013.

On May 13, 2014 Dr. Kenneth Rieger, a Board-certified orthopedic surgeon, performed an OWCP-authorized L4-S1 lumbar discectomy and lumbar laminectomy.

On August 6, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant continued to have residuals and disability due to the accepted employment injury. In a September 4, 2015 report, Dr. Askin reviewed the SOAF and medical record. He noted that appellant presented ambulating with an aluminum cane. Dr. Askin related that appellant had a surgical scar consistent with his history of the surgery performed by Dr. Rieger on May 13, 2014. Upon his review of the diagnostic imaging studies, he indicated that appellant's MRI scan dated September 20, 2013 did not show acute findings in the sense of any hemorrhage, edema, contusions, or tears of the soft tissue. However, Dr. Askin noted that there was evidence of a disc bulge, prominently at L2-3 and L4-5 that was not unexpected for a person of appellant's age. He indicated that there was nothing about the September 20, 2013 MRI scan that actually established conclusively that he required surgery. Furthermore, Dr. Askin related that there was nothing wrong with appellant's lower back from an objective clinical point of view that was not under appellant's control, and that there was nothing objectively persisting regarding the accepted conditions. He noted that appellant did not have a current disability referable to the August 16, 2013 employment injury. Dr. Askin indicated that appellant could return to full-duty work without restrictions.

In a report dated September 22, 2015, Dr. Neil Kahanovitz, a Board-certified orthopedic surgeon, noted that appellant had reached maximum medical improvement (MMI) and was unable to work due to his injuries.

In an addendum to the September 4, 2015 report dated November 3, 2015, Dr. Askin provided OWCP a clarification regarding his second opinion evaluation performed on September 4, 2015. He noted that appellant's accepted conditions had resolved because of the extended convalescence afforded to him since the August 16, 2013 employment injury. Dr. Askin

also indicated that there was no objectively determinable reason why appellant would not be able to resume his employment duties, which he was able to perform prior to the August 16, 2013 employment injury.

On February 9, 2016 OWCP provided appellant with a notice of proposed termination of his wage-loss compensation and medical benefits because the medical evidence of record established that he no longer had any residuals or continuing disability from work. It determined that the weight of the medical evidence rested with the September 4 and November 3, 2015 reports from Dr. Askin. OWCP afforded appellant 30 days to submit additional evidence or argument.

In a report dated February 16, 2016, Dr. Kahanovitz indicated that appellant appeared to have reached MMI and had failed to respond to appropriate postoperative conservative management. He noted that appellant could possibly return to work in a sedentary setting, but not as a letter carrier.

By decision dated April 4, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the weight of the medical evidence rested with Dr. Askin who reported that appellant no longer had any residuals or disability stemming from the accepted employment injury.

In a letter dated April 11, 2016, appellant, through counsel, requested a telephonic hearing with an OWCP hearing representative regarding the April 4, 2016 termination decision.

Counsel submitted a report dated May 4, 2016, in which Dr. Kahanovitz related that appellant had significant spinal stenosis and secondary foraminal stenosis at the L4-5 level that were consistent with his lower extremity radicular pain and complaints. He noted that while Dr. Askin's assessment indicated that there was no evidence of disc herniation, the aforementioned diagnoses were apparent nonetheless. Counsel related that appellant's ongoing symptoms and need for surgery were related to his employment-related aggravation of the spinal stenosis secondary to the disc herniation and nerve root impingement.

By decision dated February 28, 2017, an OWCP hearing representative affirmed the April 4, 2016 termination decision. He found that the medical evidence submitted was insufficient to outweigh Dr. Askin's medical opinion.

On July 10, 2017 appellant, through counsel, requested reconsideration of the February 28, 2017 decision.

In support thereof, appellant submitted a July 5, 2017 report from Dr. Rieger who noted appellant's medical history and diagnoses. Dr. Rieger indicated that appellant underwent a physical examination on June 21, 2017, which revealed relatively unchanged persistent sciatica and back pain. He related that appellant would only be capable of sedentary work duty at an absolute maximum. Dr. Rieger noted that appellant's diagnosis of a disc herniation at L4-5 from the August 16, 2013 employment injury was directly and causally related to his chronic pain and inability to work. He concluded that he could not disagree more strongly with Dr. Askin's November 3, 2015 assessment, because appellant had sustained injuries to both his lumbar spine and sciatic nerve that had not resolved with appropriate treatment, and would not improve in the future.

By decision dated October 6, 2017, OWCP denied modification of the February 28, 2017 decision, finding that the evidence submitted was insufficient to alter the weight of the medical evidence.

On March 8, 2018 appellant, through counsel, requested reconsideration of the October 6, 2017 decision.

In support of his reconsideration request, appellant submitted a report dated January 25, 2018 from Dr. Sripad Dhawlikar, a Board-certified orthopedic surgeon, who examined appellant for ongoing symptoms of lumbar spinal pain, lumbar radiculopathy, and weakness in the lower right extremity. He noted that further treatment of these symptoms should be part of appellant's workers' compensation claim.

In a follow-up report dated February 27, 2018, Dr. Dhawlikar, after reviewing x-rays and computerized axial tomography (CAT) scans of appellant's lumbar spine, diagnosed appellant with lumbar disc degeneration and facet arthropathy with foraminal stenosis.

In a report dated March 6, 2018, Dr. Rieger examined appellant and noted that because of appellant's radiculopathy, objective weakness, and inability to walk distances, appellant was only capable of sedentary work with maximum lifting capacity of 10 pounds.

By decision dated May 29, 2018, OWCP denied modification of the October 6, 2017 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>7</sup>

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<sup>4</sup> *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *L.H.*, Docket No. 17-1859 (issued May 10, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>5</sup> *M.C.*, *id.*; see *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *M.C.*, Docket No. 18-1199 (issued April 5, 2019); see *L.H.*, *supra* note 4; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>7</sup> *M.C.*, *id.*; see *L.H.*, *supra* note 4; *Kathryn E. Demarsh*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003).

## **ANALYSIS -- ISSUE 1**

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 4, 2016.

In his September 4, 2015 report, Dr. Askin, OWCP's second opinion medical specialist, detailed appellant's factual and medical history and reported findings on physical examination. He opined that there was no evidence of ongoing disability or medical residuals from appellant's accepted conditions. Dr. Askin found that appellant's current conditions were not unexpected for someone appellant's age. He reviewed appellant's diagnostic examinations and concluded that they did not show acute findings in the sense of any hemorrhage, edema, contusions, or tears of the soft tissue. Dr. Askin further noted that there were no objective findings on clinical examination and concluded that appellant did not require further medical treatment or work restrictions. In his supplemental opinion dated November 3, 2015, Dr. Askin clarified for OWCP that appellant's accepted employment conditions had resolved and that there was no objective evidence to negate appellant's ability to perform his date-of-injury employment duties.

The Board finds that Dr. Askin's opinion represents the weight of the medical evidence in this case. Dr. Askin provided a detailed medical report reviewing the medical records and evidence of record. He unequivocally opined that appellant did not have residuals or disability from the accepted employment-related condition, and he provided a medical explanation supported by objective findings.<sup>8</sup> Dr. Askin's reports were therefore of probative medical value.

Appellant's attending physician, Dr. Rieger, in his July 5, 2017 narrative report, opined that appellant had residuals and disability from the August 16, 2013 employment incident. However, he failed to provide a well-rationalized opinion, with supporting objective evidence that appellant's accepted conditions had not ceased. Dr. Rieger reported chronic sciatica and back pain. However, he did not provide objective physical findings of the accepted work-related conditions nor did he support his finding of continued work-related residuals and disability with medical reasoning.<sup>9</sup> Dr. Rieger's reports were therefore of limited probative value.

Similarly, OWCP received September 22, 2015 and February 16, 2016 reports from Dr. Kahanovitz. While Dr. Kahanovitz opined that appellant remained at least partially disabled, he did not provide objective findings to substantiate that appellant had residuals or disability causally related to the accepted employment conditions.<sup>10</sup>

The Board finds that the medical evidence of record was sufficient for OWCP to meet its burden of proof in this case. Dr. Askin provided a well-rationalized opinion that represents the weight of the medical evidence.<sup>11</sup>

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<sup>8</sup> See *M.C.*, *supra* note 6; see also *A.C.*, Docket No. 16-1670 (issued April 6, 2018).

<sup>9</sup> *A.G.*, Docket No. 18-0749 (issued November 7, 2018).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

## **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP meets its burden of proof to terminate appellant's compensation benefits, the burden shifts to the claimant to establish that he or she has continuing residuals or disability causally related to the accepted employment injury.<sup>12</sup> To establish causal relationship between the disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, establishing such causal relationship.<sup>13</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>14</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not established any continuing disability or residuals on or after April 4, 2016 causally related to the accepted August 16, 2013 employment injury.

Following the termination of his wage-loss compensation and medical benefits, appellant submitted a report from Dr. Kahanovitz dated May 11, 2016 in which he opined that appellant's ongoing symptoms were related to his employment-related aggravation of the spinal stenosis secondary to disc herniation and nerve root impingement. The Board finds that his opinion is of limited probative value because he did not provide medical rationale in support of his opinion on continuing work-related residuals. A medical opinion not fortified by medical rationale is of diminished probative value.<sup>15</sup> Because Dr. Kahanovitz failed to provide sufficient medical rationale for his conclusion, his opinion is of diminished probative value.

In addition, OWCP received reports from Dr. Rieger dated July 5, 2016 and March 5, 2018. Dr. Rieger opined that appellant had unchanged persistent sciatica and back pain, and that he was only capable of sedentary work. The Board has explained that if appellant claims a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.<sup>16</sup> However, Dr. Rieger did not provide medical rationale explaining how appellant's accepted injury also caused sciatica, which was not an accepted condition. Furthermore, the Board has held that pain is a symptom, not a compensable medical diagnosis.<sup>17</sup>

Appellant also submitted a report from Dr. Dhawlikar. In a report dated February 27, 2018, Dr. Dhawlikar, after reviewing x-rays and CAT scans of appellant's lumbar spine, diagnosed appellant with lumbar disc degeneration and facet arthropathy with foraminal stenosis. He neither addressed appellant's continuing disability nor provided a rationalized medical opinion that

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<sup>12</sup> *Id.*; *George Servetas*, 43 ECAB 424, 430 (1992).

<sup>13</sup> *See A.C.*, *supra* note 8.

<sup>14</sup> *See M.C.*, *supra* note 6; *D.M.*, Docket No. 17-1992 (issued September 12, 2018); *C.W.*, Docket No. 12-1211 (issued November 15, 2012); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>15</sup> *T.L.*, Docket No. 18-0536 (issued November 27, 2018); *W.W.*, Docket No. 09-1619 (issued June 2, 2010).

<sup>16</sup> *See K.V.*, Docket No. 18-1338 (issued June 19, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>17</sup> *Id.*; *S.R.*, Docket No. 14-0733 (issued August 18, 2015).

appellant continued to experience residuals of his employment-related injury.<sup>18</sup> The Board finds that Dr. Dhawlikar's report is of no probative value to meet appellant's burden of proof.<sup>19</sup>

The Board finds that appellant has not submitted sufficient medical evidence to establish that he has continuing residuals or disability on or after April 4, 2016 causally related to the accepted injury.<sup>20</sup> Appellant, therefore has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP has met its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits, effective April 4, 2016. The Board further finds that appellant has not established any continuing disability or residuals on or after April 4, 2016 causally related to the accepted August 16, 2013 employment injury.

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<sup>18</sup> *Id.*; *T.W.*, Docket No. 09-0649 (issued October 26, 2009).

<sup>19</sup> Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship. *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>20</sup> *Id.*; *Dorothy Sidwell*, 41 ECAB 857 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board